THE WHITE HOUSE

WASHINGTON

May 1, 2019

The Honorable Elijah E. Cummings
Chairman
Committee on Oversight and Reform
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Cummings:

I write in response to your letter of April 1, 2019 concerning the White House security clearance process. As I discussed in my letters of January 31, February 25, and March 4, 2019, we will continue to work through the constitutionally mandated accommodation process under which both the Legislative Branch and the Executive Branch are obligated to seek means to accommodate the Committee's legitimate oversight interests while at the same time respecting the separation of powers and the constitutional authority of the President.

Unfortunately, contrary to all prior applicable precedent, including your own prior statements, the Committee continues to insist on pursuing access to individual FBI background investigation files. Obviously, the Committee's demands fall well outside the realm of legitimate congressional information requests. It has long been recognized on both sides of the political aisle that there is no legitimate need for access to such sensitive information about individuals. In fact, there was a time when you agreed with and vigorously defended the very position the Administration is taking now. Indeed, the Committee's current requests directly contradict your prior longstanding commitment to the principle that "FBI records containing sensitive background security information provided to the White House" should be "properly protected for privacy and security." Additional and Minority Views, H. Comm. on Gov't Reform and Oversight, H.R. Rep. No. 104-862, at 117 (1996) (signed by Congressman Elijah E. Cummings and other members of the Committee). You even supported legislation to "enact procedural safeguards so that individuals could be certain their confidential background files would not be disseminated without their permission." *Id.* Nothing has changed since you espoused that view, except that the current President is a member of a different political party. Similarly, during the Clinton Administration, then-Special Counsel to the President Lloyd Cutler explained in a response to inquiries into the process for issuing White House passes and security clearances that, "under no circumstances would we permit review of individual background investigations or any other information that would violate the legitimate privacy interests of White House personnel." Letter from Lloyd N. Cutler, Special Counsel to President Clinton, to Rep. Frank R. Wolf (July 21, 1994). The Committee's insistence on securing individual background investigation files with absolutely no legal support does serious harm to settled confidentiality interests of the Executive Branch and raises individual privacy concerns that you have previously acknowledged as paramount.

In addition, the Committee's recent conduct in pursuing this protected information demonstrates a total disregard for individual privacy, for the legitimate confidentiality interests of the Executive, and for the accommodation process that mandates a cooperative approach to exploring avenues for sharing information. We recently learned that, without any notice, the Committee staff conducted an on-the-record interview of a current employee of the Executive Office of the President on a Saturday, obtained information that was not authorized to be disclosed, and apparently promptly released this information to the press. This caused media organizations to link specific information from background files to particular named individuals. It appears in this case that the Committee has completely disregarded the privacy and welfare of federal employees in order to advance a partisan political agenda, and we fear that the Committee's self-professed attempt to target "specific individuals" who decided to serve our country in various government roles will not only cause unfair harm to those good people, but will also deter qualified people from answering the call to service. *See* Apr. 1, 2019 Cummings Letter at 1. This Administration would never publicly broadcast the personal information of congressional staff or members of the federal judiciary who have subjected themselves to background investigations in order to serve our country. Executive Branch employees should be afforded the same confidentiality protection by Congress. This is not only a matter of law and longstanding practice, but of basic decency.

Despite the Committee's departures from proper process and gross breaches of privacy principles, and the various misleading statements of the Committee to the contrary, the White House has already provided substantial accommodations in response to the Committee's requests. We have provided detailed information regarding the White House security clearance process, including at an April 11, 2018 briefing by the Deputy Counsel to the President and a March 20, 2019 briefing by the head of the White House Personnel Security Office. We also made confidential White House documents concerning the security clearance process available to the Committee. Despite our efforts to find avenues for providing information, the Committee has not acknowledged *any* legitimate Executive Branch confidentiality interests and has made no attempt to limit the Committee's information demands to respect those interests. To the contrary, the Committee continues to insist that it will be satisfied with nothing less than full access to the highly confidential background investigation files of targeted, named individuals.

Notwithstanding the Committee's conduct, we continued to explore accommodations to address the Committee's information requests. On April 1, we agreed to provide the prior Director of the White House Personnel Security Office, Carl Kline, "to discuss, voluntarily and on the record, the security clearance procedures in effect throughout his tenure as Personnel Security Director." Letter from Michael M. Purpura, Deputy Counsel to the President, to Chairman Elijah E. Cummings (Apr. 1, 2019); *see also* Letter from Robert N. Driscoll to Chairman Elijah E. Cummings (Apr. 1, 2019). In response to that accommodation, the Committee again rejected any semblance of willingness to abide by the constitutionally mandated process that requires the Executive and Legislative Branches to explore avenues for mutually agreed methods of information sharing and, instead, proceeded to issue an unnecessary subpoena to compel Mr. Kline to testify regarding internal White House security clearance deliberations and individual security clearance files. The use of compulsory process is premature, raises serious constitutional concerns, and violates the constitutionally mandated accommodation process. There is simply no valid reason to subpoena or publicly threaten a good and honorable career public servant *after* he agreed

to appear voluntarily. We are pleased that on April 27, 2019 the Committee agreed to move forward with Mr. Kline's interview based on the reasonable accommodation offer that we had made over three weeks ago, after Ranking Member Jordan agreed to the offer the day before. Letter from Chairman Elijah E. Cummings to Carl Kline (Apr. 27, 2019).

As you know, the Committee's inquiry is also legally unsupportable for several reasons. Its self-described effort to "investigat[e]" the background files of "specific individuals" is improper, has no valid legislative purpose, and clearly is a mere pretext to harass and intimidate dedicated public servants. Apr. 1, 2019 Cummings Letter at 1. The Committee is also attempting to obtain confidential information relating to the President's exercise of his authority as Commander-in-Chief to grant or deny security clearances and to choose his advisors. Respectfully, it is not within the authority of Congress to second guess how the President selects his advisors or who has access to the information necessary to provide the President with fully-informed advice. Indeed, it is difficult to fathom a situation in which the President is entitled to greater constitutional protection from congressional intrusion.

This Administration's efforts to protect the confidentiality of core Executive Branch information and materials are right in line with the positions that previous administrations adopted when faced with similar congressional requests. In response to a congressional subpoena, for example, the Obama Administration correctly argued that, "[a]s courts have long recognized, the Executive Branch's role in enforcing the law requires that some materials remain confidential so that the Executive's proper functioning under the Constitution is preserved and protected." Mem. in Supp. of Def.'s Mot. for Summ. J. at 14, *Comm. on Oversight & Gov't Reform v. Holder*, No. 12-cv-1332, 2014 WL 12662665 (D.D.C. Aug. 20, 2014). Similarly, the Counsel to President Obama emphasized the need to "preserv[e] the President's independence and autonomy, as well as his ability to obtain candid advice and counsel to aid him in the discharge of his constitutional duties." Letter from W. Neil Eggleston, Counsel to President Obama, to Chairman Darrell E. Issa (July 15, 2014).

As I have repeatedly stated, the Administration respects the authority of Congress to conduct legitimate oversight and will work with the Committee through the constitutionally mandated accommodation process to provide the Committee with information it can properly seek. However, to be clear, no employee of the Executive Branch is or has been authorized to disclose to the Committee information about individual security clearance files or background investigations. My office's response to the Committee's requests will always be guided by the law and longstanding precedent, protecting both the institutional interests of the Executive as a co-equal branch of government and the robust privacy to which all government employees are entitled.

I. The Committee's Self-Described Effort To "Investigat[e]" "Specific Individuals" Is Improper.

I am troubled by the startling but telling new admission in your letter that an inquiry that purported to address the security clearance process at the White House is actually an effort to "investigat[e]" "specific individuals." Apr. 1, 2019 Cummings Letter at 1 ("You have refused to provide any information about the specific individuals the Committee is investigating . . . ."). The

Committee is not a law enforcement agency, and it is improper for it to be targeting and intimidating individual Americans under the guise of congressional oversight. *See Watkins v. United States*, 354 U.S. 178, 187 (1957) (explaining that Congress is not "a law enforcement or trial agency"); *Quinn v. United States*, 349 U.S. 155, 161 (1955) (Congress's "power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary"). Harassing and seeking to punish political opponents based on their political beliefs is not a valid exercise of Congress's investigative powers. *Watkins*, 354 U.S. at 187 ("Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible.").

Similarly, Congress does not have power to target individuals for the sake of "exposing" alleged derogatory information to the public. The Supreme Court long ago made clear that "there is no congressional power to expose for the sake of exposure," and there is no "general power to expose where the predominant result can only be an invasion of the private rights of individuals." *Watkins*, 354 U.S. at 200; *see also Quinn*, 349 U.S. at 161 (congressional investigations "cannot be used to inquire into private affairs unrelated to a valid legislative purpose").

Your recent position regarding security clearances directly contradicts your own previously stated and correct position that the government should "ensure that FBI records containing sensitive background security information provided to the White House are properly protected for privacy and security." Additional and Minority Views, H. Comm. on Gov't Reform and Oversight, H.R. Rep. No. 104-862, at 117 (1996). No administration, Republican or Democratic, would facilitate further improper disclosures of protected information by allowing the Committee the unrestricted access it currently demands to the security clearance files of named individuals.

II. The Committee's Request For Individual Security Clearance Files And Information From Those Files Has No Legitimate Legislative Purpose.

Congress's investigative powers are limited. Indeed, Congress may "only investigate into those areas in which it may potentially legislate or appropriate, [and] it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959). With regard to security clearance determinations for White House personnel, the Committee's authority to *investigate* is limited because its authority to *legislate* is limited. As you acknowledge in your letter, it is "*the President's* authority to grant security clearances." Apr. 1, 2019 Cummings Letter at 4 (emphasis added); *see also* Letter from Pat A. Cipollone, Counsel to the President, to Chairman Elijah E. Cummings 2-6 (Feb. 25, 2019) (explaining that "[t]he Constitution vests the President with plenary authority over national security information"). Thus, contrary to the assertions in the attachment to your letter, any congressional enactments to "generally prohibit[] the grant of security clearances" or dictate the "protocols and procedures for adjudicating security clearances" in certain situations would unconstitutionally impair the President's "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information." *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (noting that this authority "exists quite apart from any explicit congressional grant"); *Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996) ("[T]he President's roles as Commander in Chief, head of the Executive

Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch." (quotation marks and citation omitted)).

As previously explained in my February 25, 2019 letter, the oversight examples cited by the Committee do not support—and in fact contradict—a claim of authority or the existence of a legitimate legislative purpose to review individual security clearance decisions. The 2007 investigation into the leak of a former CIA agent's identity, for instance, was designed to address an alleged security violation that had already occurred. In that case, the Director of the White House Security Office testified regarding a particular incident and the steps taken (or not taken) in response. Here, *the Committee*—not the Executive Branch—is encouraging leaks by seeking to disseminate protected information. Indeed, the Committee has already acted recklessly by releasing a memorandum that led certain media organizations to associate information allegedly obtained from confidential background investigation files without authorization with specific, named individuals. *See* H. Comm. on Oversight and Reform Staff Mem. (Apr. 1, 2019). This conduct is particularly outrageous given that there have been no allegations that the individuals targeted by the Committee's investigation have mishandled protected information. The results of the Committee's efforts to end-run the accommodation process with a secretive Saturday interview have simply highlighted why we must redouble our efforts to protect the valid confidentiality interests of the Executive Branch.

In addition, other precedents cited by the Committee are misleading or irrelevant, including the 1996 disclosure by the Clinton Administration of certain materials associated with security clearance files. Indeed, contemporaneous documents relating to that disclosure—that you are either unaware of or have chosen to ignore—are available from the National Archives and strongly suggest that security clearance materials were *inadvertently* included in a production to Congress. *See* 2006-0946-F - Staffing of the White House Travel Office (investigations) [Segment 1] at 41, *Clinton Digital Library*, https://clinton.presidentiallibraries.us/items/show/14782 ("[I]t was never discussed; no one knew that the FBI file was being produced until after it was gone. We were caught by surprise . . . ."); *id.* at 43 (explaining that relevant White House personnel "did not know that FBI material was included"). The Committee cannot rely on an unauthorized production as binding precedent here. When viewed in this context, it is clear that this Administration's position is not novel. To the contrary, it is entirely consistent with the positions of prior administrations of both political parties and—in fact—with your own position, which we respectfully ask you to reaffirm.

The Committee's citations to various inapplicable legal precedents are also unpersuasive. *See* Apr. 1, 2019 Cummings Letter Attach. at 1-2. For instance, *Barenblatt*—which involved an investigation of a private party, not the Executive Branch—actually stands for the proposition that Congress may "only investigate into those areas in which it may potentially legislate or appropriate." 360 U.S. at 111-12. The Court did not hold, as the Committee suggests, that Congress can impair the President's exercise of powers constitutionally assigned to the Executive. Apr. 1, 2019 Cummings Letter Attach. at 1. The Committee's citation to *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), is also misplaced. Although Congress has a limited role in "[n]ational-security policy," *see id.* at 1861 (citing U.S. Const. Art. I, § 8), the Court has made clear that the

authority to grant security clearances belongs to "the President as head of the Executive Branch," *Egan*, 484 U.S. at 527.

The Committee also claims that the White House misreads *Egan*. That is incorrect. The *Egan* Court discussed the absence of statutory language governing judicial review for security clearance denials and explained that "general proposition[s] of administrative law" do not apply where, as here, they involve "a sensitive and inherently discretionary judgment call [that] is committed by law to the . . . Executive Branch." 484 U.S. at 527. And, as discussed, *Egan* makes clear that the President's authority with regard to national security information "exists quite apart from any explicit congressional grant." *Id.*

Even if the Committee were to articulate a legitimate legislative purpose relating to security clearances, there is no need for the Committee to examine past security clearance determinations for particular individuals. As the U.S. Court of Appeals for the District of Columbia Circuit has explained, "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events." *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (en banc) (contrasting the proper scope of congressional "fact-finding" with a grand jury's "need for the most precise evidence"). Thus, employee-specific information is certainly not required, or even necessary, to assess "whether Congress should amend current laws to improve national security and enhance transparency over these decisions," as the Committee suggests. Apr. 1, 2019 Cummings Letter at 4.

The Committee's list of potential legislative options does not change the analysis, but instead powerfully proves our point. *See* Apr. 1, 2019 Cummings Letter Attach. at 3-4. For instance, if the Committee's goal is to truly consider "[l]egislation creating or amending criminal penalties for the improper disclosure or possession of national security information," *id.* at 3, there is no conceivable need to assess the contents of any particular individual's security clearance application or file. That is particularly true in light of (i) your claim during the Committee's April 2, 2019 hearing that the Committee is simply focused on "investigating the process"; (ii) the fact that the White House has already provided process-related documents and briefings, while offering additional testimony by a former official, to the Committee; and (iii) your previously-stated belief that federal employees should "be certain their confidential background files" are not "disseminated without their permission." *Full Committee Business Meeting Before the H. Comm. on Oversight and Reform*, 116th Cong. (Apr. 2, 2019); Additional and Minority Views, H. Comm. on Gov't Reform and Oversight, H.R. Rep. No. 104-862, at 117 (1996).

III. The Committee Is Requesting Documents That Are Not Subject To Disclosure Under Settled Legal Principles.

As discussed, it has long been recognized by the courts and administrations of both political parties that strong confidentiality protections are essential for the proper functioning of the Executive Branch. *See* Obama Admin. Mem. in Supp. of Def.'s Mot. for Summ. J. at 14, *Comm. on Oversight & Gov't Reform v. Holder*, No. 12-cv-1332, 2014 WL 12662665 (D.D.C. Aug. 20, 2014) ("As courts have long recognized, the Executive Branch's role in enforcing the law requires

that some materials remain confidential so that the Executive's proper functioning under the Constitution is preserved and protected.").

Despite the numerous concerns expressed in my prior correspondence, the Committee has refused to modify the scope of its information requests at all. Apr. 1, 2019 Cummings Letter at 3. Instead, it is simply "prioritizing the production" of certain materials. *Id.* But even those "prioritz[ed]" requests appear to seek four categories of materials that are protected from disclosure.

First, the Committee's requests cover communications to and from the President—communications at the heart of executive privilege. For example, the requests seek documents "drafted by or for" the President's most senior advisors, including the White House Chief of Staff, Deputy Chief of Staff, and Counsel to the President. *Id.* The President has a constitutionally grounded interest in being able to consult with his advisors in a confidential manner, and the Committee is not entitled to the documents it seeks to the extent they reflect communications with the President. *See United States v. Nixon*, 418 U.S. 683, 705 (1974) ("The [presidential communications] privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."); *cf. Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach From Congressional Subpoena*, 38 Op. O.L.C. __, at *6 (July 15, 2014) ("[S]ubjecting an immediate presidential adviser to Congress's subpoena power would threaten the President's autonomy and his ability to receive sound and candid advice.").

Second, the Committee seeks numerous documents reflecting the kind of internal Executive Branch deliberations that have been consistently recognized as protected communications. For example, the fourth "prioritiz[ed]" request in the Committee's letter seeks security clearance "[a]djudication summaries" for nine current and former White House employees. Apr. 1, 2019 Cummings Letter at 3. By definition, these summaries reflect judgments and recommendations by Executive Branch employees regarding whether a particular individual should receive a security clearance. Protections ensuring that the deliberative process can remain confidential apply to these types of materials. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (documents that reflect "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" are protected (quotation and citation omitted)); *Assertion of Executive Privilege Over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious*, 36 Op. O.L.C. __, at *3 (June 19, 2012) ("The threat of compelled disclosure of confidential Executive Branch deliberative material can discourage robust and candid deliberations . . . ."); *Assertion of Executive Privilege Over Communications Regarding EPA's Ozone Air Quality Standards and California's Greenhouse Gas Waiver Request*, 32 Op. O.L.C. 1, 2 (2008) ("Documents generated for the purpose of assisting the President in making a decision are protected" and these protections also "encompass[] Executive Branch deliberative communications that do not implicate presidential decisionmaking"); *Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2, 3 (1996) ("The Supreme Court has expressly (and unanimously) recognized that the Constitution gives the President the power to protect the confidentiality of White House communications.").

Third, the Committee has requested materials from individual security clearance files—including adjudication summaries—that consist, in large part, of information gathered and prepared by the FBI, the disclosure of which would risk undermining the ability of law enforcement agencies to conduct future security clearance investigations. Releasing information prepared by the FBI in connection with a security clearance review would undermine the investigative process, expose sensitive information that could jeopardize the FBI's ability to conduct future investigations, and raise serious separation of powers concerns. *Cf. Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7, 10 (2008). Indeed, releasing confidential security clearance files would likely hinder future cooperation with background investigations. Third parties would be more reluctant to provide information for background investigations if they understood that the information being gathered would not be kept confidential but instead would be released to a partisan congressional committee inappropriately investigating individuals and then promptly leaked to the media. *See id.* at 11. This Administration will not be a party to efforts that would weaken the Executive Branch's ability to secure full, candid cooperation with background checks and thereby weaken America's national security.

Fourth, the Committee seeks information regarding security clearance determinations that implicate sensitive information. For instance, the Committee's fifth "prioritiz[ed]" request seeks documents "memorializing the circumstances under which security clearances were granted or denied." Apr. 1, 2019 Cummings Letter at 3. The Supreme Court has explained that the President as Commander-in-Chief should be afforded the "utmost deference" in the context of protecting national security information. *Nixon*, 418 U.S. at 710-11; *see also* Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, and John R. Stevenson, Legal Adviser, Dep't of State, *Re: The President's Executive Privilege to Withhold Foreign Policy and National Security Information* at 7 (Dec. 8, 1969) ("[N]ational security and foreign relations considerations have been considered the strongest possible basis upon which to invoke the privilege of the executive."). The Committee is not legally entitled to these highly sensitive materials.

IV. The Committee Appears To Be Putting Public Servants At Risk In Order To Advance A Partisan Political Agenda.

As a matter of basic courtesy and respect for a co-equal branch of our government, I again request that your staff work through my office to request information from current or former White House officials. Prior administrations of both political parties have made the same request. *See, e.g.*, Letter from Kathryn H. Ruemmler, Counsel to President Obama, to Chairman Fred Upton, Chairman Cliff Stearns, Chairman Joseph Pitts, and Vice Chairman Michael Burgess (Nov. 14, 2011) ("[A]ny requests from Committee or Committee staff to speak with current or former White House officials about their official responsibilities at the White House should be directed to the Office of the White House Counsel."). Consulting with my office will ensure that the Committee efficiently obtains access to the information and individuals to which it is entitled and that any disclosure of privileged information to Congress is properly authorized.

Much of the information requested by the Committee is subject to protections from disclosure by law. *See, e.g.*, Privacy Act, 5 U.S.C. § 552a; Exec. Order No. 12,968 § 7.2 (limiting

the dissemination of information obtained in connection with security clearance reviews); Standard Form 86 ("The collection, maintenance, and disclosure of background investigative information are governed by the Privacy Act."); *Assertion of Executive Privilege With Respect to Prosecutorial Documents*, 25 Op. O.L.C. 1, 2 (2001) ("The Constitution clearly gives the President the power to protect" information subject to executive privilege).

It is highly improper for the Committee to induce or encourage the unauthorized disclosure of confidential information in order to launch public political attacks on individuals as part of advancing a partisan political agenda. As discussed, the Committee's activities may also discourage individuals from pursuing careers in the government or from otherwise participating in the security clearance process. I respectfully urge the Committee to cease these improper methods of obtaining information to which it is not legally entitled.

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As I have said numerous times, my office will work with the Committee through the constitutionally mandated accommodation process to provide the Committee with materials it can properly request. We are disappointed that the Committee has chosen to unnecessarily escalate this dispute without engaging my office in additional negotiations following our recent substantial accommodations. I welcome the opportunity to discuss any of these points at your convenience.

Sincerely,

Pat A. Cipollone

Pat A. Cipollone
Counsel to the President

cc: The Honorable Jim Jordan, Ranking Member